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JURISDICTIONAL STATEMENT AND LEGAL HISTORY OF THE CASE

Joseph Moreland, Jr. filed a Petition for Damages on August 20th, 1996, alleging that respondents were negligent in hiring and keeping a violent and dangerous employee/tenant who eventually stabbed and severely injured Mr. Moreland in an unprovoked assault on the evening of September 13, 1992. (L.F. 1-5). Respondents filed motions for summary judgment on September 26, 1997, and February 9, 1998. (L.F. 20-23, 49-54). The trial court heard argument on the motions and sustained both on March 27, 1998. (L.F. 126-127).

An appeal was taken by Mr. Moreland challenging the summary judgment, W.D. No. 55794. (L.F. 128-129). The Missouri Court of Appeals, Western District, dismissed the appeal for lack of jurisdiction on June 22, 1999. (L.F. 134-138). The appellate court found that the trial court had failed to certify the judgment as final as required by Rule 74.01(b). Id. Furthermore, the summary judgment motions of respondents addressed only one of the two theories under which plaintiff claimed respondents were negligent. Id. Accordingly, the grant of summary judgment also failed to dispose of the claim not argued to the trial court, a theory of negligent hiring and retention. Id.

On March 30, 2000, the trial court entered an amended order granting summary judgment as to respondent Helen Marie Farren-Davis only. (L.F. 139-142). This appeal followed.

This case does not involve the validity of a statute or treaty of the United States, nor a statute or provision of the Constitution of the State of Missouri. Jurisdiction is proper in this Court. Mo. Const., Art. V, Sec. 3; § 477.070 R.S.Mo. (1994).

STATEMENT OF FACTS

[These facts are reproduced from appellant's original brief of September 26, 2000, in the Missouri Court of Appeals, Western District, #WD55794.]

I. The Incident

It was a warm September evening in 1992 and Joe Moreland had just left his apartment, one of four units in a building located at 3932 Terrace, in Kansas City, owned by respondent Helen Marie Farren Davis. (L.F. 2, 89, 101; Moreland Depo. 21, 39; Wm. Davis Depo. 25-26; Farren-Davis Depo. 17, 25-26). He walked next door into the adjacent yard of 3928 Terrace, where Bill and Karen Davis, the owners of that property, were working on their lawnmower. (L.F. 40, 42, 50; Moreland Depo. 39-40; Wm. Davis Depo. 31, 57). Karen Davis gave this account of what happened next to a Kansas City, Missouri police detective less than 24 hours after the incident:

> Q. Ms. Davis, will you relate for me the events that occurred on 9/13/92 at about 2005 hours while you were at 3928 Terrace?
>
> A. We were working on our riding lawn mower. I had gone down to the other house and *Ramon Gonzales, who is staying in my mother-in-law's apartment building at 3928 Terrace*, came up from 39th St. I had gone down there to get a tool out of my husband's truck. When I turned around he was coming up the driveway *yelling at me that he wasn't going to work for us any more*. He was very intoxicated. I told him I wasn't going to argue with him and got around him and went back to 3928 Terrace. Then he came up there, he followed me

back to the garage, *he was yelling that he wasn't going to work for us any more, and he wasn't going to work for free*. This went on for at least 20 minutes, then he went to his apartment, and I thought it was over, we told him to go sleep it off. Joe Moreland and his fiancé live in the same apartment building and Joe came out to the garage where we were. Ramon came back and started pushing Joe, I don't know why because Joe wasn't doing anything to him, he was just back there. He pushed him at least two or three times, and the last time he pushed him he pushed him into the lawn mover. Joe grabbed a wrench and said, "I told you not to push me any more" and at that point Ramon lunged at him, and I thought he was going to hit Joe, and Joe had the wrench in his hand and he hit Ramon in the head as he was lunging at him. Joe hollered 'Ouch', and I said, "What happened?" He said, "He got me" but I didn't know what he meant. He said "He knifed me or something" and then he said, "No, I guess I got pinched" because there was no blood. He walked over by our car, and he said, "My leg hurts, I can't move my leg." He pulled his shorts down a couple of inches and there was a gash in his leg, and I ran down the driveway to call 911, but Ramon had already gone that way and he came back at me and said, "Do you want some too?" Ramon said something like, did Bill want it too. Then Ramon went down the driveway and I was behind him and he turned round

came at me again with the knife, so I ran into a neighbor's house and ran up on the porch and called 911 from there.

(L.F. 40, Signed Statement of Karen Davis, dated 9-14-92, p. 1 of 2) (emphasis added).

The stab wound inflicted by Ramon Gonzales perforated Joe Moreland's stomach, ureter and large intestine, resulting in severe infection, two surgeries, six weeks of hospitalization, and permanent injuries. (L.F. 4-5; Moreland Depo. 51-58). Ramon Gonzales pleaded guilty to Assault in the First Degree on October 7, 1992, and was sentenced on October 21, 1992 to a ten year suspended sentence with four years probation. (Tr. 24; Jackson Cty. Case No. CR92-3711).

II. Gonzales' Employment

Helen Marie Farren-Davis, age 88, owns three rental properties, including the four-unit apartment building at 3932 Terrace, Kansas City, Missouri. (Farren-Davis Depo. 6, 17, 23-25; Wm. Davis Depo. 25-26). In 1983 she rented an apartment to Ramon Gonzales at the request of a mutual friend, a Mr. Steed. (Farren-Davis Depo. 36-38). Mr. Gonzales failed to pay his rent and was evicted after three or four years. (Farren-Davis Depo. 38; Wm. Davis Depo. 93).

In 1989 Ms. Gonzales moved back into Helen Marie Farren-Davis' apartment building at 3932 Terrace. (Wm. Davis Depo. 93; Farren-Davis Depo. 39). This time, instead of paying rent, he agreed to do work for Ms. Farren-Davis, and her son and daughter-in-law, Bill and Karen Davis, on either Helen Marie's property at 3932 Terrace, or Bill and Karen's property at 3928 Terrace, next door. (Farren-Davis Depo. 93-98; Karen Davis Depo. 61-65). The work would be equal to fifty dollars a week's worth --

that is Mr. Gonzales was supposed to do fifty dollars a week's worth of work for which he would not be paid, but instead allowed to keep his apartment rent free. (Wm. Davis Depo. 94-95, 97; Karen Davis Depo. 61-62). Although the arrangement of work for rent was set up between Gonzales and William Davis, Mr. Davis first consulted his mother and obtained her permission. (Wm. Davis Depo. 94, 97-98). Helen Marie Farren-Davis also agreed to pay Mr. Gonzales' utilities. (Wm. Davis Depo. 95-96; Farren-Davis Depo. 48).

For his part, Mr. Gonzales fulfilled his portion of the agreement by painting the apartments, mowing the lawn, and doing minor repairs, such as fixing broken windows. (Farren-Davis Depo. 42-44; Wm. Davis Depo. 84-85). He also did cleaning work and some repair work on the apartment building's foundation. (Wm. Davis Depo. 85; Farren-Davis Depo. 42-44; Wm. Davis Depo. 84-85). He was never paid any money, but Bill and Karen Davis kept track of the time he worked and lent him their lawnmower to mow the two lawns. (Wm. Davis Depo. 84-85, 91-92, 94-95; Karen Davis Depo. 61-64). Although it was her apartment unit Gonzales was staying in rent-free, Helen Marie Farren-Davis left Ramon's work supervision up to Bill and Karen Davis; she had no idea of how often or what type of work Bill and Karen had Ramon doing at 3932 Terrace. (Farren-Davis Depo. 43-44).

Apparently, Gonzales became unhappy with the "work for nothing-live for free" arrangement he had with the Davises and had finally decided to call it quits the very night of the stabbing. (L.F. 40-41). According to Karen Davis, Ramon told her, yelled at her,

just before the stabbing that he, "wasn't going to work for us any more, and he wasn't going to work for free." (L.F. 40-41).

III. Agency of Bill and Karen Davis

The work-for-rent agreement William Davis negotiated and enforced with Ramon Gonzales on behalf of his mother, Helen Marie Farren-Davis, was not the only evidence that Bill and Karen Davis were managing the 3932 Terrace apartments for Helen Marie. When asked at her deposition about the free-rent and utilities she provided to Ramon Gonzales, Mrs. Farren-Davis admitted that, at age 81 (in 1992), she left the day to day operations of the apartment to her son and daughter-in-law:

> Q. You just let him live there and weren't being paid any rent for that period of time?
>
> A. Well, I knew he worked from time to time. But I didn't, you know, what -- I don't live there. I didn't have my -- it was not a hands-on operation.
>
> Q. Who did? Who watched over it?
>
> A. Bill and Karen were down the street. They would see if things needed to be done.

(Farren-Davis Depo. 43-44).

Even Karen Davis acknowledged that she and her husband directed Ramon Gonzales as to what work needed to be done at 3932 Terrace, because Helen Marie wasn't around often:

Q. Do you know if he ever did any work on the property at 3932 Terrace?

A. He mowed the grass.

Q. Was that at your direction or at Helen Marie Davis' direction?

A. A little of both I think.

Q. Are you saying that Helen Marie Davis would have personally instructed Ramon to mow the grass?

A. Not personally. But she would tell us to if the lawn needed mowing or, you know, if she came by and if it looked a little shaggy, she'd say, "The lawn needs to be mowed." One of us told Ramon to mow the lawn. Because I'd have to get lawn mover for him because he used our lawn mower to do it.

Q. Did he do any other work besides mowing the lawn on that property?

A. Yes. He painted Sheila and Joe's apartment before they moved in.

Q. Who hired him to do that?

A. That was part of an agreement with Helen Marie and us with Ramon. We were kind of -- I don't know how you word it -- we weren't his managers or his keepers or anything like that. It was just kind of like if she wanted Ramon to do something, she would ask us to ask him.

Q. She would go through you?

A. Yes. But that was only with Ramon, nobody else. Only because she wasn't over there enough. And he had no phone, so she couldn't call him.

(Karen Davis Depo. 58-59).

Although he wasn't paid for it, Bill Davis considered himself responsible for the general maintenance of his mother's property at 3932 Terrace:

Q. Do you assist her in maintaining any of her rental properties.

A. The 3932, now I keep the yard up and everything there.

Q. How long have you been doing that?

A. Probably since '86.

Q. Did you do anything else for her on that property?

A. Just general maintenance.

Q. Since 1986 --

A. Yes.

Q. -- to the present date?

A. Yes.

(Wm. Davis Depo. 79).

It should be noted that at the time of the stabbing of Joe Moreland on September 13, 1992, the apartment complex at 3932 Terrace was one of three of Helen Marie's properties that were being held in trust for the benefit of her step-son, William Charles Davis. (Farren-Davis Depo. 19-22).

Two functions of an apartment manager that Bill Davis claimed not to fulfill were those of showing vacant apartments to prospective tenants and collecting the rent from the three tenants who paid rent. (Wm. Davis Depo. 79-81; cf. Sheila Lusher Depo. 19-20, 23-24, 110-111). At least one tenant, Sheila Kay Lusher, Joe Moreland's fiancé, testified under oath that Bill and Karen Davis handled virtually all of the maintenance and repairs at 3932 Terrace:

> Q. You rented from Helen Marie Davis just over two years, so from April of '92 to April of '94; is that correct?
>
> A. Correct.
>
> Q. And Joe was living with you at that time; correct?
>
> A. Correct.
>
> Q. And whenever there was something that needed to be maintained, repaired, did you contact Helen Marie?
>
> A. No, I contacted Karen.
>
> Q. And was that because basically you were seeing her and dropping off your children at her place?
>
> A. Well, *whenever any work needed to be done on the property they did it*. Like if the back apartments needed work done on them, they'd work on those, you know. If the heater wasn't working right, I just called them, they come down and work on it.

(Sheila Lusher Depo. 19) (emphasis added).

IV. Knowledge of Ramon Gonzales as Dangerous

Ramon Gonzales was described by William Davis as "a heavy drinker" who "liked to quit [work] early in the day so he could drink." (Wm. Davis Depo. 102). Karen Davis claimed in her deposition that Gonzales would quit work early to drink alcohol "as often as he could make it happen." (Karen Davis Depo. 69). Both of the Davises acknowledged that when drunk, Ramon Gonzales "becomes crazy," "becomes a very ugly person when he starts drinking," (L.F. 43), and "every time he's that way he starts a fight with the first person he sees." (L.F. 41). Indeed, on one occasion a drunk Ramon Gonzales even threw a putty knife at, his employer, Karen Davis, striking her on her side. (Karen Davis Depo. 86).

There were many instances of the violent proclivities of Ramon Gonzales that Bill and Karen knew of before the September 13, 1992 stabbing of Joe Moreland. Karen Davis admitted that she knew Ramon had been arrested on the complaint of a neighbor, John Rodriguez, who alleged that Ramon had hit him and threatened violence upon his mother, a woman in her 70s or 80s. (Sheila Lusher Depo. 48-49; Moreland Depo. 36-38; Karen Davis Depo. 71-73; Wm. Davis Depo. 112). On another occasion Ramon Gonzales threatened Sheila Lusher with a hammer, resulting in Ramon's arrest and a personal complaint to William Davis about the incident. (Sheila Lusher Depo. 28-31; Moreland Depo. 24-27; Karen Davis Depo. 77-78). Another tenant, Mr. Christopher Fern, complained to Bill Davis that he was so afraid of the threats being made by Ramon Gonzales towards him and his family that he had taken to carrying a bat and would use it on Ramon Gonzales if necessary. (Sheila Lusher Depo. 46-47). Joe Moreland had

Ramon Gonzales arrested on two other occasions aside from the hammer incident with Sheila. (Moreland Depo. 32).

Another incident involved Ramon drunk in the early evening, swinging a machete and yelling at people. (Moreland Depo. 29-30). John Rodriguez called the police on this occasion, but Ramon had already fled the scene by the time the police arrived. (Moreland Depo. 29-30). Still, Bill Davis admits he did take a machete from Ramon Gonzales because Ramon "was carrying it around with him while he was drinking." (Wm. Davis Depo. 111). Karen Davis was concerned because the machete actually belonged to she and Bill:

Q. Your husband testified that he took away a machete from Mr. Gonzalez.

A. It was our machete.

Q. It was your machete?

A. Yes.

Q. How did he get your machete?

A. When he worked for us cutting weeds and stuff he'd just cart it into his apartment. We finally told him he couldn't carry it with him anymore. And we started locking the garage.

Q. He would carry the machete around with him?

A. Bill said he started carrying it around with him all the time. I didn't know he was carrying it around with him all the time, or I would have started locking the garage a lot sooner.

Q. Why was the machete taken away from him?

A. Well, *we didn't want someone to misconstrue -- to think that he was going to attack them with it and blame us.* So we just -- I don't know -- we just didn't think he ought to be carrying it around. He had never attacked anybody before, but somebody could, you know, see somebody coming down the street with a blade two feet long.

(Karen Davis Depo. 82-83) (emphasis added).

After seeing Ramon shoving Karen Davis when he was drunk and demanding money, Sheila Lusher told Karen Davis that she would appreciate it if Karen wouldn't allow Ramon to be around Sheila's kids. (Sheila Lusher Depo. 41-43). Although Sheila Lusher would complain to the Davises regularly about Ramon Gonzales, the Davises never evicted Ramon Gonzales, or took any action to protect the tenants, other than removing Ramon's machete. (Sheila Lusher Depo. 53-56; Karen Davis Depo. 73-75). Joe Moreland told the Davises about Ramon's violent tendencies every time there was a problem with Ramon Gonzales. (Moreland Depo. 102-103, 73-75). Karen Davis remembers the complaints being as frequently as once per week. (Karen Davis Depo. 75).

Whenever Ramon Gonzales was arrested Karen Davis would inform Helen Marie Farren Davis of the incident leading to his arrest. (Karen Davis Depo. 79-80). In addition to Karen's reports, both Joe Moreland and Sheila Lusher told Helen Marie about their concerns regarding Ramon. Joe Moreland told Helen Marie that Ramon was violent and needed to be removed from the premises at 3932 Terrace. (Moreland Depo. 95-97).

Sheila Lusher told Helen Marie that she "was worried about [Ramon] because he was harassing us and making threats against us and that I really didn't feel safe living there." (Sheila Lusher Depo. 53-55). Helen Marie Farren Davis would later deny that anyone ever told her about Ramon's arrests, his threats, his drinking, or his violent tendencies. (Farren Davis Depo. 50-58).

POINT ONE

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN THIS CAUSE BECAUSE: (A) THERE IS A GENUINE FACTUAL DISPUTE THAT PRECLUDES A FINDING FOR SUMMARY JUDGMENT, AND (B) IF THE FACTS ARE PROVEN AS APPELLANT ALLEGES, THERE IS A DUTY OWED TO APPELLANT BY RESPONDENT HELEN MARIE FARREN-DAVIS UNDER THE "SPECIAL FACTS" EXCEPTION TO THE RULE PRECLUDING LIABILITY FOR THE DELIBERATE CRIMINAL ATTACK OF A THIRD PARTY IN THAT RESPONDENT KNEW OF THE DANGEROUS AND VIOLENT PROPENSITIES OF APPELLANT'S ATTACKER YET INCREASED THE RISK OF PHYSICAL HARM TO APPELLANT BY HIRING AND RETAINING THE ATTACKER AS AN EMPLOYEE AND PROVIDING HIM RENT-FREE, UTILITIES-PAID LODGING IN THE SAME BUILDING THAT APPELLANT LIVED IN.

Advance Rental Centers, Inc. v. Brown, 729 S.W.2d 644 (Mo. App. S.D. 1987);

Fincher v. Murphy, 825 S.W.2d 890 (Mo. App. W.D. 1992);

Groce v. Kansas City Spirit, Inc., 925 S.W.2d 880 (Mo. App. W.D. 1996);

Scheibel v. Hillis, 531 S.W.2d 285 (Mo. banc 1976).

POINT TWO

THE TRIAL COURT'S AMENDED SUMMARY JUDGMENT ORDER DOES NOT ADDRESS APPELLANT'S CLAIM OF NEGLIGENT HIRING AND RETENTION BY RESPONDENT HELEN MARIE FARREN-DAVIS, AN ISSUE NOT ADDRESSED IN RESPONDENT'S SUMMARY JUDGMENT MOTION WHICH RAISES ONLY A PREMISES-LIABILITY DEFENSE, AND THEREFORE THE TRIAL COURT COULD NOT GRANT SUMMARY JUDGMENT PURSUANT TO RULE 74.04 TO PRECLUDE A THEORY OF RECOVERY FOR NEGLIGENT HIRING AND RETENTION. WHEREFORE, THE COURT'S AMENDED ORDER GRANTING SUMMARY JUDGMENT PURPORTING TO DISPOSE "OF ALL CLAIMS ALLEGED BY PLAINTIFF AGAINST DEFENDANT HELEN MARIE FARREN-DAVIS" IS UNLAWFUL AND IN CONTRAVENTION OF RULE 74.04

Farley v. Wappapello Foods, Inc., 959 S.W.2d 888 (Mo.App. S.D. 1997);

Metro Waste Systems, Inc. v. A.L.D. Services, Inc., 924 S.W.2d 335 (Mo.App. E.D.1996);

Morris v. Brown, 941 S.W.2d 835 (Mo.App. W.D. 1997);

Norris v. Jones, 661 S.W.2d 63 (Mo.App. S.D. 1983);

Rule 55.33, M.R.Civ.P.;

Rule 74.04, M.R.Civ.P.

ARGUMENT ONE

The trial court erred in granting summary judgment in this cause because: (a) there is a genuine factual dispute that precludes a finding for summary judgment, and (b) if the facts are proven as appellant alleges, there is a duty owed to appellant by respondent Helen Marie Farren-Davis under the "special facts" exception to the rule precluding liability for the deliberate criminal attack of a third party in that respondent knew of the dangerous and violent propensities of appellant's attacker yet increased the risk of physical harm to appellant by hiring and retaining the attacker as an employee and providing him rent-free, utilities-paid lodging in the same building that appellant lived in.

I. Standard of Review

The standard of review for summary judgment motions is essentially de novo and is conducted in the same manner as review of a court-tried case. The judgment will be sustained if any theory supports it. AG Processing, Inc. v. South St. Joseph Indus. Sewer Dist., 937 S.W.2d 319, 332 (Mo. App. W.D. 1996); Anderson v. Accurso, 899 S.W.2d 938, 941 (Mo. App. W.D. 1995). On appeal, this court reviews the record in the light most favorable to the party against whom judgment was entered. ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. banc 1993).

II. Summary Judgment Inappropriate Where Factual Issues Are In Dispute

"Summary judgment is designed to permit the trial court to enter judgment, without delay, when the moving party has demonstrated, on the basis of facts as to which there is no genuine dispute, a right to judgment as a matter of law." ITT Commercial Financial Corp., supra, at 376. Rule 74.04, to satisfy the no factual dispute

"requirement," requires the moving party to "state with particularity in separately numbered paragraphs each material fact as to which the movant claims there is no genuine issue…" Rule 74.04 (c)(1). As can be seen from the various summary judgment motions, and appellant's responses. (L.F. 20-125), there are many factual issues in dispute in this case. For that reason alone summary judgment should not have been granted in this cause.

III. Helen Marie Farren-Davis Knowledge of Tenant Ramon Gonzales' Dangerous and Violent Disposition, and the Risk Created to Tenants Thereby, Created a Special Circumstance Shifting to the Landlord A Duty to Protect the Tenant from the Foreseeable Harm of Mr. Gonzales' Violence

A landlord in Missouri does not have a general duty to protect a party against the intentional criminal conduct of unknown third persons. Advance Rental Centers, Inc., v. Brown, 729 S.W.2d 644, 645 (Mo. App. S.D. 1987); Meadows v. Friedman Railroad Salvage Warehouse, 655 S.W.2d 718, 721 (Mo. App. E.D. 1983). However, a duty may arise when a landlord "might reasonably anticipate a danger from intentional or criminal misconduct because he had brought the victim into contact or association with a person or persons whom he knows, or should know, to be particularly liable to commit criminal acts, and under such circumstances which afford a peculiar opportunity or temptation for such misconduct." Scheibel v. Hillis, 531 S.W.2d 285, 288 (Mo. banc 1976); Advance Rental Centers, supra, at 645. "Factors to be considered in determining whether or not one is required to take precautions…include the known character, past conduct and tendencies of the person whose conduct causes the harm, the opportunity or temptation

which the circumstances may afford him for such misconduct, together with the gravity of the harm which may result. Scheibel v. Hillis, supra, at 288.

There is ample evidence from the depositions and record in this case that all three respondents had knowledge, actual and constructive, that Ramon Gonzales, tenant and employee of Helen Marie Farren-Davis, was a violent and dangerous individual when under the influence of alcohol. One day after Joe Moreland's stabbing, and almost four years before this lawsuit, Karen and Bill Davis told police as much:

> Q. Do you know why Ramon was so upset?
>
> A. He was angry because on Wednesday and Thursday I had refused to take him to the grocery store because he was so drunk. And every time he's that way he starts a fight with the first person he sees.

(L.F. 40, Stmt. of Karen Davis, 9-14-92).

> Q. Is there anything else that you wish to add to this statement?
>
> A. Basically, I think he's an alcoholic. He'll start out drinking wine for a week or two and he just more or less becomes crazy. Normally he doesn't hurt anybody. He becomes a very ugly person when he starts drinking.

(L.F. 42, Stmt. of Wm. Davis, 9-14-92).

Respondents had received repeated notice of Ramon Gonzales' violent proclivities, both from their own observations and the complaints of tenants, Joe Moreland, Sheila Lusher, John Rodriguez, Christopher Fern and others. Gonzales was repeatedly carted off by police, and these instances each reported to Helen Marie Farren-

Davis, the landlord. Helen Marie and the Davises had all received personal complaints from Joe Moreland and Sheila Lusher, that Ramon Gonzales had been harassing, threatening, and intimidating them, complaints occurring as often as once per week. (Sheila Lusher Depo. 53-55; Karen Davis Depo. 75; Moreland Depo. 73-75, 95-97, 102-103).

In response to these many concerns regarding Ramon Gonzales' violent disposition, the only action taken by his employers, the respondents, was to remove their machete from his reach, a danger even they recognized as unacceptable and of potential liability to themselves. (Karen Davis Depo. 82-83). Even on the very evening of the incident, seeing Ramon Gonzales drunk, angry, and armed with a butcher knife, Karen and Bill Davis never even warned the unsuspecting Joe Moreland that his life was in imminent peril at the hands of a crazy man:

Q. Mr. Davis, did you witness an incident on 9-13-92, at approximately 8:00 p.m.. when Joseph Moreland was stabbed?

A. Yes, I did.

Q. Tell me what happened.

A. I was there at 3928 Terrace working on some lawnmowers and stuff. My wife, Karen Davis, was helping me and Ramon Gonzales showed up. He appeared to be drunk and I think he's been drunk so far all this month. He showed up and got ahold of my wife first and roughed her up a little bit. He pushed her a couple of times, grabbed ahold of her and tried to pull her. I think he was saying, "Suck my

dick," once. Then he came up and started with me. It was basically all verbal. During this time he got mad and went over in his apartment and came back out in less than a minute armed with a butcher knife. He continued to give us verbal abuse and maybe a little threatening. We had to back him out of the garage. Joseph came over and basically to be friendly with us and Ramon. Ramon pushed Joseph around a couple of time with just his hands and verbally abused him. I guess Joseph didn't realize it was serious or anything and Ramon was going to push Joseph again and Joseph was going to defend himself when he saw Ramon coming at him. Ramon went up, grabbed a hold of Joseph, and stabbed him with one hand in the left side of his back. Ramon backed up and we tried to get away to call the police. He tried to keep us there, together, with the knife. He was poking the knife at us and I don't remember what he was saying. My wife was able to get away, go across the street, and call 911. He took off running

Q. Describe the knife Ramon stabbed Joseph with?

A. It looked like an eight or ten inch blade kitchen knife with a wooden handle.

(L.F. 42, Stmt. of Wm. Davis, 9-14-92).

Under such a situation as existed here, the "special circumstances" exception to the no-duty rule imposes upon Helen Marie Farren-Davis and her son and daughter-in-

law, an obligation to take action to prevent harm to Joe Moreland from a person known to be violent and in a situation particularly likely to result in violence.

IV. Liability May Be Imposed Where Respondents Create the Risk of Harm Off Of Their Premises

In the trial court, respondents sought to avoid liability by pointing fingers at each other. Helen Marie Farren-Davis contended that she did not own the property where the assault occurred, 3928 Terrace, her son and daughter-in-law's property, and having had no control over it, could not be liable for what happened there. (L.F. 5-9). William and Karen Davis countered that Ramon Gonzales was not their tenant, not their employee, and therefore, having had no control over him, they could not be held liable for his actions assuming, arguendo, that they knew he was dangerous. (L.F. 71-76). Each was wrong.

"Missouri and other states have recognized an exception to the rule that the attack must have occurred on the defendant's premises in those cases in which the defendant created or increased the risk of injury to the plaintiff on property off of, but near, the defendant's premises." Groce v. Kansas City Spirit, Inc., 925 S.W.2d 880, 886 (Mo. App. W.D. 1996). In Fincher v. Murphy, 825 S.W.2d 890 (Mo. App. W.D. 1992), a labor union was held responsible for an assault *on the street outside the election hall* because the union knew of the potential for violence from a hotly contested election involving threats of violence prior to the election. Even though the attack occurred off of the premises, "there was a sufficient connection between the union's activities and the action which resulted in the injury to impose a duty to take reasonable steps to protect the

plaintiff from those on the street adjacent to its union hall, at least for a reasonable period of time." Groce, supra, at 887.

As in Fincher, where the court found that the defendant knew of the person's "turbulent disposition" and "had been involved in prior altercations which ended in violence," Id., Helen Marie Farren-Davis was also well aware of Ramon Gonzales' violent propensities against her tenants, including Joe Moreland, and to her son and daughter-in-law. She also knew, as the defendant did in Fincher, that there was a probability of violence occurring based on Ramon Gonzales' past actions. Yet she opted to do nothing. Instead, she allowed this ticking time bomb to explode on Joe Moreland, nearly killing him just a few feet from her premises.

Appellant contends that Helen Marie Farren-Davis did increase the risk of harm to Joe Moreland by retaining in her employ, and in her apartment building *rent-free*, the dangerous individual who was Ramon Gonzales. Had Gonzales been evicted for failure to pay his rent, failure to work, for his multiple arrests, or most appropriately, for his repeated drunken tirades of abuse and violence toward respondent's other tenants, Sheila Lusher, Joe Moreland, John Rodriguez, Christopher Fern, and others, then Ramon Gonzales would not likely have been threatening Bill and Karen Davis with a butcher knife on the evening of September 13, 1992. Helen Marie Farren-Davis created this dangerous situation by knowing of Ramon Gonzales' violent propensities and failing to evict him as a tenant, or to terminate his employment, either of which would have prevented this violent act upon appellant. Had Helen Marie Farren-Davis not allowed this drunken, violent freeloading terrorist to live for free, utilities paid, at 3932 Terrace,

he would unlikely have been in a position to walk next door to 3928 Terrace to stab and seriously injure Joe Moreland when he did. Given that Ramon's "deal" with Helen Marie required that Ramon also perform work for Bill and Karen Davis, owners of 3928 Terrace, it was entirely foreseeable that this dangerous man would in fact be next door, bringing his potential for violence to that address as often as he decided to work there.

Respondent Farren-Davis was undoubtedly well aware of Ramon Gonzales' violent history. Her daughter-in-law, codefendant Karen Davis, testified that each time Mr. Gonzales was arrested she would inform respondent Farren-Davis of the incidents leading to the arrests. (Karen Davis Depo. 79-80.) Both the appellant and his girlfriend, Shiela Lusher, testified that they told respondent Farren-Davis directly about their concerns regarding Mr. Gonzales. In fact, shortly before the incident, appellant told respondent Farren-Davis that Mr. Gonzales was violent and needed to be removed from the premises at 3932 Terrace. (Moreland Depo. 95-97.) Tenant Lusher told respondent Farren-Davis that she "was worried about [Mr. Gonzales] because he was harassing and making threats against" she and Joe and that she really didn't feel safe living there. (Lusher Depo. 53-55.) Although respondent Farren-Davis denied such knowledge, clearly there was ample evidence to indicate otherwise.

Although the court in Fincher did not define what it meant when it stated that the "duty [to protect innocent members] could be found to extend to the adjacent areas [including the public street] where the danger was likely to appear for "some reasonable period of time" after the creation of the danger by the union, the court did cite to the California Supreme Court case of Weirum v. R.K.O. Gen., Inc., 15 Cal. 3d 40, 539 P.2d

36, 123 Cal. Rptr. 468 (1975) for guidance. In Weirum, even though the court did not define "reasonable time," it did focus on the ***foreseeability*** of the violence occurring when it did. "Foreseeability of the risks is a primary consideration in establishing the element of duty." Id., at 46.

Respondent Farren-Davis should have easily foreseen that her employee/tenant, Mr. Gonzales, was on the verge of attacking one of her tenants, or her son or daughter-in-law, immediately prior to the actual attack of Joe Moreland. She had ample warning through the managers of her complex, codefendants William and Karen Davis, and her tenants, that Mr. Gonzales would someday resort to violence against appellant or another occupant.

Helen Marie Farren-Davis was not only negligent in hiring Ramon Gonzalez in the first place, without employment screening of any kind, but then in allowing him to continue working for her when reason, common sense, and prudence urged that he should be terminated and required to leave, long before the stabbing of Joe Moreland. Her negligence allowed Mr. Gonzales to have access to respondent's tenants, including appellant, and to continue to terrorize them.

ARGUMENT TWO

The trial court's amended summary judgment order does not address appellant's claim of negligent hiring and retention by respondent Helen Marie Farren-Davis, an issue not addressed in respondent's summary judgment motion which raises only a premises-liability defense, and therefore the trial court could not grant summary judgment pursuant to Rule 74.04 to preclude a theory of recovery for negligent hiring and retention. Wherefore, the court's amended order granting summary judgment purporting to dispose "of all claims alleged by plaintiff against defendant Helen Marie Farren-Davis" is unlawful and in contravention of Rule 74.04

I. Standard of Review

The standard of review for summary judgment motions is essentially de novo and is conducted in the same manner as review of a court-tried case. The judgment will be sustained if any theory supports it. AG Processing, Inc. v. South St. Joseph Indus. Sewer Dist., 937 S.W.2d 319, 332 (Mo. App. W.D. 1996); Anderson v. Accurso, 899 S.W.2d 938, 941 (Mo. App. W.D. 1995). On appeal, this court reviews the record in the light most favorable to the party against whom judgment was entered. ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. banc 1993).

II. Appellant Clearly Raised Negligent Hiring and Retention as a Theory of Liability Against Helen Marie Farren Davis

The Missouri Court of Appeals, Western District, in its July 14, 1999, mandate, spent the better part of four pages explaining its view that the respondents' summary judgment motions were fatally defective in attempting to dispose of appellant's case

because each addressed ***only one of the two theories*** of recovery appellant was alleging against them. (emphasis added) Appellant alleged in his Petition that the defendants/respondents were jointly and severally negligent in the following respects:

DEFENDANTS' ACTS OF NEGLIGENCE

Defendants, jointly and severally, were negligent in one or more of the following respects:

a. failing to take preventive action to protect the plaintiff and others from injury though defendants knew or should have known Ramon Gonzales was violent and had manifested violent propensities and sufficient time existed in which to take such preventive action;

b. failing to exclude, preclude or otherwise prohibit Ramon Gonzales, who was known to be violent, from residing on the defendants' premises prior to the attack;

c. allowing Ramon Gonzales to remain on defendants' premises when the defendants knew that Ramon Gonzales was violent and/or had manifested violent and/or vicious tendencies likely to inflict injury upon others;

d. allowing Ramon Gonzales to reside on defendants' premises after he had conducted himself so as to indicate that he posed a danger to others and sufficient time existed to prevent the plaintiff's injury;

e. failing to evict Ramon Gonzales prior to the attack;

f. failing to adequately and properly screen tenants including Ramon Gonzales;

g. failing to adequately and properly screen employees including Ramon Gonzales;

h. in hiring Ramon Gonzales, in maintaining his employment, and/or in failing to terminate his employment, when the defendants knew or should have known that Ramon Gonzales was violent and/or had manifested violent propensities toward others; and

i. the defendants, individually, as trustee, or by and through their agents and/or employees, were otherwise negligent in failing to adhere to the requisite standards of due care in further particulars which may be disclosed on proper discovery procedures in the course of this litigation.

(Plaintiff's Petition, L.F. 3-4). The Court of Appeals succinctly boiled down these paragraphs, stating, "Our reading of the appellant's one count petition reveals that he pled that *the respondents* were jointly and severally liable on his claim for damages under the alternative theories of premises liability and negligent hiring and retention." (L.F. 136) (emphasis added). The Court of Appeals vacated the summary judgment order and remanded the case back to the trial court for reconsideration in light of its decision.

On March 30, 2000, the trial court entered an Amended Order Granting Summary Judgment (L.F. 139-142). Once again, as it had done over two years before, the trial court granted summary judgment without at all discussing appellant's negligent hiring and retention claim. Remarkably, it did so after the court's mandate specifically addressed the problem with the previous summary judgment order of March 27, 1998:

> In order to be entitled to summary judgment as to the appellant's entire claim, [Helen Marie Farren-Davis] had the burden under Rule 74.04(c) to state with particularity each material fact on which [she] relied to be entitled to judgment as a matter of law as to both theories pled by the appellant. *Zafft [v. Eli Lilly & Co.,]* 676 S.W.2d [241] at 244 [(Mo. banc 1984)]; *Ganaway [v. Shelter Mutual Ins. Co.,]* 795 S.W.2d [554] at 556 [(Mo. App. S.D. 1990)]. Because [she] failed to do that as to the pleaded theory of negligent hiring and retention, the trial court, at most, could have granted [her] partial summary judgment on the appellant's claim as to the theory of premises liability, the correctness of which we have no jurisdiction to decide, given our holding herein. As such, with respect to the appellant's claim against [Helen Marie Farren-Davis], the trial court's summary judgment only disposed of one theory of recovery alleged by the appellant, but not the entire claim. Hence, the trial court could not grant summary judgment to [Helen Marie Farren-Davis] on the appellant's entire claim…

(L.F. 137a.). *(The original addressed the Davises, not Helen Marie.)* This defect remains as fatal now as it was when the Court of Appeals first addressed it two years ago.

III. Appellant Sufficiently Pled in His Petition that Codefendants William and Karen Davis Were Agents of Respondent Helen Marie Farren-Davis

Appellant further pled in his Petition for Damages, that Mr. Gonzales was an employee of respondent Farren-Davis. In his petition, under "Facts of the Occurrence," appellant pled as follows:

> 9. At all times relevant hereto, defendants William and Karen Davis managed the aforesaid apartment complex on behalf of the defendant Helen Marie Farren Davis' aforementioned property.
>
> 10. Ramon Gonzales at all times relevant hereto was an employee of the defendants William Davis and Karen Davis.

(L.F., p. 8.)

The petition clearly alleges that respondent Farren-Davis was a principal, and codefendants William and Karen Davis were her agents in regards to managing her property, including the hiring of Mr. Gonzales. Therefore, the negligent hiring of Mr. Gonzales by codefendants William and Karen Davis was imputed on respondent Farren-Davis via respondeat superior and agency law. This was succinctly and clearly asserted in the appellant's petition, including the following allegations:

a) that defendants William and Karen Davis were respondent Farren-Davis' agents;

b) that defendants William and Karen Davis hired Mr. Gonzales; and

c) that defendants William and Karen Davis and respondent Farren-Davis negligently hired Mr. Gonzales.

(L.F. 3-4.)

Respondent Farren-Davis has never contended, including in her Motion for Summary Judgment and in her briefs, that appellant failed to plead agency as to codefendants William and Karen Davis in regards to managing her property. While she may dispute that they were her agents, which is contrary to her own testimony and the testimony of codefendants William and Karen Davis, she has never argued that appellant's pleading was deficient in stating that defendants were her agents and that they managed her property.

Even if there was some confusion in the pleadings relating to the agency of the codefendants, the Court is required to construe appellant's allegations "liberally" in his favor. Morris v. Brown, 941 S.W.2d 835 (Mo.App. W.D. 1997). Further, it is well recognized in Missouri, by case law and court rule, that a petition is deemed to conform to the evidence presented. Rule 55.33, M.R.Civ.P.; Morris, supra; Farley v. Wappapello Foods, Inc., 959 S.W.2d 888, 892 (Mo.App. S.D. 1997); Metro Waste Systems, Inc. v. A.L.D. Services, Inc., 924 S.W.2d 335 (Mo.App. E.D. 1996); Norris v. Jones, 661 S.W.2d 63 (Mo.App. S.D. 1983).

In this case, during the course of discovery, the following facts regarding the hiring and retaining of Mr. Gonzales were admitted by Respondent Farren-Davis and codefendants:

a) That respondent Farren-Davis agreed to allow Mr. Gonzales to reside at 3932 Terrace, her apartment complex, rent-free in exchange for doing work on respondent's property and defendant Bill and Karen Davis' property. (Farren-Davis Depo. 93-98; Karen Davis Depo. 61-65.);

b) That although the arrangement of work for rent was set up between Mr. Gonzales and defendant William Davis, Mr. Davis first consulted with respondent Farren-Davis to obtain her permission. (Wm. Davis Depo. 94, 97-98.);

c) That respondent Farren-Davis also agreed to pay Mr. Gonzales' utilities. (Wm. Davis Depo. 95-96; Farren-Davis Depo. 48.);

d) That Mr. Gonzales performed the work of painting the apartments, mowing the lawns, doing minor repairs and cleaning. (Farren-Davis Depo. 42-44; Wm. Davis Depo. 84-85.);

e) That Mr. Gonzales was never paid any money. (Wm. Davis Depo. 84-85; Karen Davis Depo. 61-64.); and

f) That respondent left Mr. Gonzales' work supervision up to defendants Bill and Karen Davis. (Farren-Davis Depo. 43-44.)

Throughout the deposition of respondent Farren-Davis, appellant's attorney was allowed to ask questions regarding the hiring of Mr. Gonzales. In fact, Ms. Farren-Davis freely answered such inquiries during her deposition without any objection from her counsel.

While there may be a dispute about whether Helen Marie Farren-Davis acted negligently in hiring and retaining Ramon Gonzalez as an employee, there is no dispute

that she, with her co-defendant son William Davis, hired and retained Gonzalez. They have both admitted such in their depositions:

Q: Do you know whether Mr. Gonzalez signed a lease when he moved back in 1989?

A: When he moved back in he wrote his own rental agreement to live there by the week.

Q: It was in writing?

A: It was written in Spanish.

Q: Do you know who has that rental agreement?

A: I think Karen and I have it, but we have not been able to locate it.

Q: Now why would you have possession of the rental agreement and not your stepmother?

A: Because he talked to us about moving back in, and *I talked to Helen Marie, and she said it was okay*.

Q: What were the terms of that agreement?

A: The terms of the agreement, he was supposed to do so much work a week.

Q: On that property?

A: Well, if not on that property for – on something.

Q: On your property?

A: Yes, if not on Helen Marie's property.

Q: So in exchange for living in that apartment he agreed to do jobs on that property and any of your property –

A: Uh-huh.

Q: -- that's right?

A: Yes.

(Wm. Davis Depo. 93-94) (emphasis added).

Q: Was he required to pay utilities?

A: No.

Q: Who paid the utilities for him?

A: In that apartment the utilities were paid by Helen Marie.

(Wm. Davis Depo. 95-96).

Q: Now you've testified that you approached your mother about Ramon moving back into the apartment. Tell me what the arrangement was. What did she agree to allow Ramon to do in order to move back into the apartment?

A: Basically just to work enough to – work so much each week.

Q: Was there a required amount of hours he was to work each week?

A: Yes. And [he] didn't have to work for us. He could have worked for somewhere else and then paid her in cash.

Q: Do you know whether he ever did that?

A: I know he worked other places.

Q: Do you know whether he ever paid your stepmother in cash?

A: No. Huh-uh.

Q: So there were no specifics in regard to how many hours a week he would have to work in order to stay in that apartment without paying rent?

A: His original agreement, he wanted to pay $50.00 a week.

Q: And he could either pay that or do odd-and-end jobs around the property or work for you and Karen –

A: Yes.

Q: -- to pay that off?

A: Uh-huh.

Q: And the utilities would be paid by your stepmother?

A: Yes.

Q: And your mother agreed to this arrangement?

A: Yes.

(Wm. Davis Depo. 96-98). Helen Marie Farren-Davis, questioned after sitting through her son's deposition, was less confident in her memory of her deal with the devil, Mr. Gonzales, but still knew that he worked for her in exchange for free rent and utilities:

Q: You heard your son testify today that he's the one that put this agreement together, this arrangement together; was that not accurate?

A: That was probably accurate.

Q: So he did have something to do with this arrangement?

A: I imagine. I don't remember.

Q: Was part of that arrangement that he could work either for you or for your stepson?

A: Yes. Yes.

Q: Do you have any recollection of your stepson approaching you and asking you if Ramon could move back into the apartment in exchange for doing work for you or him?

A: I would assume so. I honestly don't remember.

Q: You do not know?

A: No. I don't know what I should answer. I really don't remember.

Q: (By Ms. Hagen) When he moved back in in the late '80s did Mr. Gonzalez ever send you payments, rent payments?

A: No.

Q: Never?

A: No.

Q: So he was living in that apartment –

A: Doing work.

Q: -- in exchange for doing work for either you or for your son?

A: Yes.

(Farren-Davis Depo. 41-42).

In this matter, the appellant clearly pled that "[d]efendants, jointly and severally, were negligent… in hiring Ramon Gonzales…" (L.F. 8-9.) In addition, appellant pled

that defendants William and Karen Davis were agents of respondent Farren-Davis, and that they hired Mr. Gonzales. (L.F. 8.) These allegations were not mere conclusions, but specific facts pled in the petition. Giving the pleadings a liberal and favorable construction, this Court should find that appellant adequately plead negligent hiring by respondent Farren-Davis.

Even assuming, arguendo, that appellant failed to allege in his petition that respondent Farren-Davis hired or employed Mr. Gonzales herself or through her agents, it is well recognized in Missouri that a petition is deemed to conform to the evidence presented. Rule 55.33, M.R.Civ.P.; Morris v. Brown, 941 S.W.2d 835 (Mo.App. W.D. 1997). Respondent Farren-Davis suffers no surprise or prejudice by appellant's claim that she negligently hired and retained the violent, alcoholic Ramon Gonzales, putting Gonzales in a position to impale Joe Moreland with a butcher knife. She admits that she hired him with her son, codefendant William Davis, and paid him with free rent and utilities. In spite of his obviously violent temperament, reported to her on several occasions, she kept Gonzales around to do "free work." In the end, Joe Moreland ended up paying for it. The pleading should be allowed to conform with the abundant evidence on this issue.

III. Conclusion

For respondent Farren-Davis, the harm that befell Joe Moreland at the point of a knife wielded by a drunken, angry Ramon Gonzales was entirely foreseeable, and well within her control to reduce, if not eliminate. The risk of harm was personal, indeed life-threatening, not economic, a distinction recognized in several states:

> Two major considerations are: the nature of the harm likely to result from a failure to exercise due care, and the relationship that exists between the parties. Where the failure to exercise due care creates a risk of economic loss only, courts have generally required an intimate nexus that is satisfied by contractual privity or its equivalent. By contrast, where the risk created is one of personal injury, no such direct relationship need be shown, and the principal determinant of duty becomes foreseeability.

Matthews v. Amberwood Assoc. Ltd. Partnership, Inc., 719 A.2d 119, 351 Md. 544, 560-561 (1998).

Summary judgment was inappropriate under such circumstances. This cause should be allowed to proceed to trial. Accordingly, appellant prays this Court reverse the decision of the Court of Appeals affirming the amended order for summary judgment entered below and remand this cause for further proceedings consistent with its holding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing document was hand-delivered on this _____ day of July, 2001, to:

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CERTIFICATE OF COMPLIANCE

I hereby certify that the word count is 8,623, which is in compliance with the limitations contained in Special Rule No. 1 (b). Furthermore, the diskette that has been filed with the Court has been scanned for viruses and are virus-free.

_____
Patrick J. Berrigan